CHAPTER 4

TOWARDS A SUBSTANTIVE STYLE OF JUDICIAL REASONING

4.1 INTRODUCTION

In Chapter 1 of this thesis formalism was identified as one of the four most significant deficiencies of pre-democratic South African administrative law, albeit not one listed in the Breakwater Declaration of 1993.¹ That era was characterised by exaggerated judicial deference to the other arms of government and the philosophy I call ‘parsimony’: the pervasive notion, shared by the courts and informed by fears of overburdening the government, that administrative justice had to be hoarded and doled out only sparingly.² The courts’ energies were thus largely directed towards a negative enterprise: finding ways to restrict the application of the principles of good administration.³ As will be shown in this chapter, formalism played a major role in that enterprise. For this and other reasons, the transformation of South African administrative law demanded the development of a more substantive style of judicial reasoning.

While formalism appears in many guises, for the purposes of this thesis it has been described as a style of reasoning, especially as used by courts of law, which prefers formal, technical or mechanistic reasons over substantive ones⁴ and which is preoccupied with the outward appearance of legal problems at the expense of their substance.⁵ Conceptualism, formalism of a more specific type, has been characterised as a belief in the possibility of solving legal problems merely by applying concepts to them syllogistically, or more simply as treating concepts as the key to legal problems.⁶ While we are concerned here with the specific context of administrative law, it is important to appreciate that formalism has been identified as a characteristic of South Africa’s legal culture more broadly. Equally, the need for transformation in this respect is not confined to one or two branches of the law but is mandated by the South African Constitution as a whole. However, that need is certainly

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¹ See at 1.5(c).
³ Ibid 168.
intensified by the culture of justification associated with post-1994 public law in general and administrative law in particular.

This chapter begins with a discussion of these very issues. The focus then shifts to particular examples of formalism in South African administrative law of the pre-democratic era, with reference being made where necessary to discussion in Chapters 2 and 3. In each instance consideration is given to the extent to which the law has moved away from formalism and towards a more substantive style of judicial reasoning. As will be seen, some progress had been made in this regard even before the advent of the democratic era and the sweeping substantive promise, in s 33 of the 1996 Constitution, of administrative justice for everyone. It is unfortunate that the PAJA seems to subvert that promise to some extent, both in its definition of administrative action and elsewhere. As against this, however, there is further evidence of a judicial movement away from formalism in two recent developments in administrative law: the courts’ increasing reliance on the constitutional principle of legality and their commitment to an explicit doctrine of deference or respect.

4.2 FORMALISM IN SOUTH AFRICA’S LEGAL CULTURE

Formalism has assumed a number of different guises in South African administrative law, some of which are discussed below.7 Fundamentally, however, they (or most of them)8 may be regarded as representations of the same phenomenon: a determination on the part of the judiciary, and to an extent the legal profession more broadly, to avoid the politics of law and to steer clear of ‘policy’ – not merely in this area of the law but throughout the legal system.

Judicial formalism is in fact a characteristic of South Africa’s legal culture generally,9 and as such it may be regarded as a significant part of our colonial inheritance from both English and Roman-Dutch law. This is because, as Baxter explains, the quest for impersonal, apolitical justice was strong in England and certain other western European countries, including France and the Netherlands.10 In the history of each of these countries essentially the same bargain was struck: legal autonomy was secured at the expense of political influence and, having acquired their independence, judges obediently retreated from substance to form.

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7 At 4.3.
8 For instance, the debate about whether unlawful administrative acts are best described as ‘void’ or ‘voidable’ could be regarded as ‘formalistic’: see eg J R de Ville ‘The Rule of Law and Judicial Review: Re-reading Dicey’ 2006 Acta Juridica 62 at 62. However, the dichotomy would seem to have little or nothing to do with an avoidance of substance.
In England the retreat was given special impetus in the nineteenth century by the work of theorists such as Bentham and especially Austin, whose conceptual analysis ‘celebrated the alleged political neutrality and autonomy of the rules and principles of lawyers’ law’. 11

(a) The autonomous legal order and the separation of law and politics

In their famous essay on types of law-in-society Nonet and Selznick shed considerable light on the historic separation of law and politics. 12 The authors describe three stages of socio-legal development: ‘repressive law’, where law is the servant of repressive power; autonomous law, where law becomes capable of taming repression and aspires to procedural justice; and finally ‘responsive law’, the stage at which law becomes responsive to social needs and aspires to substantive justice. 13 In this typology the middle stage, autonomous law, emerges to cure both the instability and illegitimacy of repressive law. Its own legitimating device is the rule of law, the notion of procedural and impersonal justice, which relies on a disjunction of political will and legal judgment. 14 So the separation of law and politics is the ‘master strategy’ of autonomous law. 15 As these authors explain,

‘Law is elevated above politics; that is, the positive law is held to embody standards that public consent, authenticated by tradition or by constitutional process, has removed from political controversy. The authority to interpret this legal heritage must therefore be kept insulated from the struggle for power and uncorrupted by political influence. In interpreting and applying the law, jurists are to be objective spokesmen for historically established principles, passive dispensers of a received, impersonal justice. They claim to have the last word because their judgments are thought to obey an external will and not their own.’ 16

Writing on the same theme, Unger identifies four distinctive aspects of the autonomous legal order that emerged with modern European liberal society: substantive, institutional, methodological and occupational autonomy. 17 Thus the liberal state exhibits ‘a separate body of legal norms, a system of specialized legal institutions, a well-defined

11 Baxter Legal Education (note 10 above) 8.
13 Ibid. The main characteristics of each type are usefully summarised at 16.
14 Ibid 57, and see also Henk Botha ‘The Legitimacy of Legal Orders (3): Rethinking the Rule of Law’ (2001) 64 THRHR 523.
15 Nonet & Selznick (note 12 above) 59.
16 Ibid 57, my emphasis.
17 Roberto Mangabeira Unger Law in Modern Society: Towards a Criticism of Social Theory (1976) 53-4.
tradition of legal doctrine, and a legal profession with its own relatively unique outlook, interests, and ideals’. 18 These aspects are interdependent, but the ideal of impersonal justice seems to reinforce autonomy especially in the ‘substantive’ and ‘methodological’ senses – that is, in differentiating legal norms from religious, political or economic ones, and in establishing a method or style of legal reasoning that differentiates it from moral, political and economic discourse. 19

As Unger observes, in Western liberal society the distinction between politics and adjudication became a ‘cornerstone of constitutionalism and a guiding principle of political thought’. 20 The dichotomy was encouraged by the dominant legal theory of the age, legal positivism, with its clear distinction between law and morality; and it received further reinforcement from those legal theorists, including Dicey, who wished to create a distinct ‘science’ of law. 21 In this atmosphere a rule-centred and formalistic style of legal reasoning was bound to flourish. As Nonet and Selznick point out, the formalistic application of rules assists the project of legitimation. ‘[T]he courts are most secure when they most nearly approximate the paradigm of mechanical jurisprudence. If judges can find a closely apposite precedent or statute, and can act out a prescribed routine, they validate their self-image as legal technicians and sustain their role as passive instruments of the legal process.’ 22

As a result of the dominance of English law and English legal thinking in this country from the early nineteenth century onwards, 23 the ideal of autonomy and its formalistic mindset became part of South Africa’s legal heritage. Few real societies will conform to a single type, 24 and even at the height of apartheid the South African legal system exhibited autonomous as well as repressive characteristics. So, notwithstanding markers of repressive law such as rampant official discretion and intolerance of criticism of the government, the system also revealed a definite aspiration to autonomy and to the rule of law. Indeed, the apartheid government prided itself on virtues such as strict adherence to legal authority and the independence of the judiciary. 25

18 Ibid 54.
19 Ibid 53.
20 Ibid 54.
22 Nonet & Selznick (note 12 above) 61.
23 The first British occupation of the Cape lasted from 1795 to 1803 and the second for more than a century, from 1806 to the time of Union in 1910. On the influence of English legal institutions, see H R Hahlo & Ellison Kahn The South African Legal System and its Background (1968) 575ff.
24 Nonet & Selznick (note 12 above) 17.
(b) Judicial formalism under apartheid

The quest for impersonal justice and the reasons behind it need not, of course, be identical in different societies. In relation to the rise of formalism in American legal thought in the mid-nineteenth century, for instance, Horwitz describes the separation of law and politics as a central aspiration of the American legal profession in particular. Amongst other things, it would help to legitimate ‘the special claim of the profession to determine the nature and scope of legal development’. But, as Horwitz explains, formalism also served mercantile and entrepreneurial stakeholders who had an interest in ‘freezing’ legal doctrine at that time. While the profession yearned for an objective, apolitical conception of law, it also happened to suit the entrepreneurs to establish law as a ‘fixed and inexorable system of logically deducible rules’.

In pre-democratic South Africa, too, formalistic judicial reasoning had a particular raison d’être: it could explain away the failure of judges to denounce the laws of apartheid, and it could absolve them of responsibility for enforcing those laws. As Dugard explains with reference to the ‘mechanical’ approach to statutory interpretation, this was especially consoling to liberal judges who did not support government policy:

‘If statutory interpretation were to be accepted as an exercise in judicial choice this would emphasize the personal responsibility of judges for the interpretation, application, and enforcement of those laws. It is therefore comforting for the judge opposed to the laws he is required to enforce to seek refuge in the knowledge that his role is purely declaratory and mechanical.’

In a similar fashion, Dugard reminds us, judges opposed to slavery enforced the Fugitive Slave law by focusing on ‘their formal duty to apply the law, and the law alone, and by denying moral, personal responsibility for its application’. As for judicial officers who did support apartheid, Dugard suggests that the judges’ allegiance to a crude Austinian brand of positivism was to blame for their commitment to

27 Ibid.
28 Ibid 256.
29 Dugard (note 25 above) 372. See also his earlier contributions on this theme: John Dugard ‘The Judicial Process, Positivism and Civil Liberty’ (1971) 88 SALJ 181 and ‘Some Realism About the Judicial Process’ (1981) 98 SALJ 372. More recently, Botha has perceptively described the reliance of the apartheid legal system on metaphors to justify and normalise coercion and discrimination: see Henk Botha ‘Metaphoric Reasoning and Transformative Constitutionalism’ 2002 TSAR 612 (Part 1) and 2003 TSAR 20 (Part 2).
30 Dugard (note 25 above) 372.
passivity and neutrality in the interpretation and application of statute law.\footnote{31} Put bluntly, ‘rigid adherence to the distinction between law as it is and law as it ought to be leads to a rejection of legal values – as opposed to legal rules – which results in the neglect of considerations of human dignity’ and other values infusing the common law.\footnote{32} Dugard’s emphasis on ‘vulgar’ or ‘command-theory’ positivism was evidently intended to answer his critics sympathetic to contemporary accounts of positivism.\footnote{33} In his exploration of the link between ‘plain fact’ interpretation and legal positivism, however, Dyzenhaus goes considerably further.\footnote{34} He points out that the contemporary positivist conception of judicial responsibility remains hostile to a ‘morally charged’ view of the common law, and also that ‘the positivist focus on content-independent rules blocks the interpretative process in which judges have to engage in order to weave the best understanding of law out of what might seem particularly unpromising precedents’.\footnote{35} In short, the positivist approach ‘blocks creativity’.\footnote{36}

\textbf{(c) Formalism and the demands of a culture of justification}

In post-1994 South Africa, positivism may be thought to be ‘wholly inappropriate’\footnote{37} as a theory of judicial responsibility. To put it in slightly different terms, the conceptual tools of autonomous law seem inapt for a legal system with such strong aspirations to responsiveness. However, another view is that the system is now so thoroughly imbued with substance that any tension between rules and values has surely been dissolved\footnote{38} and any blocks to judicial creativity removed. As Cockrell has pointed out, the Constitution has replaced the ‘formal vision’ of the old era – its overriding interest in the pedigree of legal rules – with a ‘substantive vision’.\footnote{39} Replete as it is with values, the Bill of Rights expressly invites judges to embrace substantive reasoning in reaching their decisions. In fact, as Cockrell suggests, a judge confronted with legal provisions of this type ought to find it impossible to ‘latch onto a

\begin{itemize}
\item \footnote{31}{Ibid 373.}
\item \footnote{32}{Ibid 374.}
\item \footnote{34}{David Dyzenhaus \textit{Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy} (1991) Chapter 9, ‘Positivism and the Plain Fact Approach’.}
\item \footnote{35}{Ibid 247.}
\item \footnote{36}{Ibid.}
\item \footnote{37}{Henk Botha ‘The Values and Principles Underlying the 1993 Constitution’ (1994) 9 SA \textit{Public Law} 233 at 233, and see also T P van Reenen ‘The Relevance of the Roman (-Dutch) Law for Legal Integration in South Africa’ (1995) 112 SALJ 276 at 288.}
\item \footnote{38}{Alfred Cockrell ‘Rainbow Jurisprudence’ (1996) 12 \textit{SAJHR} 1 at 34.}
\item \footnote{39}{Ibid 3ff.}
\end{itemize}
determinate rule and to treat it as a formal reason for a decision irrespective of the underlying reasons of substance’. 40

Impossible or not, formalistic judicial reasoning is certainly incompatible with the transformative project of the democratic Constitution. That project, expressly acknowledged by the Constitutional Court in several cases, 41 is revealed in the panoply of substantive rights conferred by the Constitution, including rights to equality and socio-economic rights. It is also revealed in provisions such as s 7 of the 1996 Constitution, which imposes a duty on the state to act positively to realise rights, and s 39(2), which requires all law to be interpreted so as to promote the ‘spirit, purport and objects’ of the Bill of Rights. What the transformative nature of the Constitution demands of judges is ‘transformative adjudication’, described by Moseneke as the task of judges who are enjoined by the Constitution ‘to uphold and advance its transformative design’. 42 And as Langa has indicated, a commitment to substantive reasoning lies at the very heart of a transformative constitution. 43 Another way of putting this is to say that transformative adjudication calls for a policy of ‘anti-formalism’. 44

In the context of public law and administrative law in particular, the constitutional commitment to a culture of justification elaborated in Chapter 1 45 underscores the need for substantive rather than formalistic modes of judicial reasoning. A culture of justification, it is worth repeating, is one in which every exercise of power is expected to be justified. 46 This applies to exercises of judicial power too. Pieterse points out, for instance, the judges’ duty to demand adequate justification of the other branches of government whenever the constitutional rights of citizens are threatened, as well as the need for the judiciary finally to abandon the remnants of the culture of extreme deference to the executive which it perfected during the apartheid years. 47 On the subject of judicial reasoning and justification, Langa has this to say:

40 Ibid 8.
45 At 1.4(b).
46 Etienne Mureinik ‘A Bridge to Where?: Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31 at 32.
47 Marius Pieterse ‘What Do We Mean When We Talk About Transformative Constitutionalism?’ (2005) 20 SA Public Law 155 at 165.
‘The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.’ 48

Formalism is thus an insufficient and unsatisfactory form of justification under the democratic Constitution. It may also be a false justification to the extent that it ‘prevents an inquiry into the true motivation for certain decisions and presents the law as neutral and objective when in reality it expresses a particular politics and enforces a singular conception of society’. 49 Whether formalistic reasoning is used for repressive purposes, as it was in the UDF case, 50 or for progressive purposes, as it was in cases such as Hurley, 51 it tends to promote misdirection or to amount to the use of ‘code’. 52 In either instance the real reasons for the judicial decision are unlikely to emerge – and that can hardly promote the values of accountability and transparency to which the Constitution commits itself so thoroughly. 53

Yet, as Klare showed in his seminal article of 1996, formalism is a strong and pervasive element in South Africa’s legal culture, and the presence of a democratic, transformative and value-laden Constitution does not necessarily spell the immediate end of it. 54 In that piece Klare discerned a chasm between the Constitution’s substantively transformative aspirations and the traditionalism of South African legal culture, 55 which he feared would discourage innovation and an appreciation of the inherent plasticity of legal materials. 56 A decade later Froneman observed that ‘some of the basic points’ of the substantive vision were ‘still some way off from being accepted as truisms of our new legal culture’. 57 Most recently, Langa has warned against formalistic interpretation of the

48 Langa (note 43 above) 353, and see Dennis Davis Democracy and Deliberation (1999) 15-16.
49 Ibid 357.
50 Staatspresident v United Democratic Front 1988 (4) SA 830 (A), in which the Appellate Division switched to a literal or narrow conception of the ultra vires doctrine after decades of upholding a wide version. The result was that emergency regulations, though admittedly vague, were not ultra vires the enabling legislation.
51 Minister of Law and Order v Hurley 1986 (3) SA 568 (A), in which an ouster clause was found to be ineffective. The court reasoned that the clause prevented it from pronouncing on action taken ‘in terms of’ the legislation – and that ultra vires action did not qualify as so taken.
52 Hoexter ‘Contracts’ (note 5 above) 597.
53 See 1.4(c) above.
54 Klare (note 9 above) 146.
55 Ibid 170.
56 Ibid 171.
Constitution itself, which enables judges to avoid engagement with substance and thus to evade the search for justice.\(^{58}\)

It seems, then, that the courts of this era remain constrained at least to some extent by the formalistic legal culture they inherited from the old era, for the substantive aspirations of our legal system do not automatically bring about a change in the style of our judicial reasoning.\(^{59}\) Indeed, given the subtle and pervasive nature of a legal culture and the double-edged nature of formalism – its ability to be used for conservative or progressive purposes – the eradication of formalistic tendencies may prove difficult. Indeed, formalism is not always acknowledged to be a problem;\(^{60}\) and even if it were, anti-formalism is not something that can be legislated.

The next section engages with formalism in the particular context of South African administrative law. It does not attempt a complete catalogue of administrative-law formalism. Rather, it examines four of the clearest manifestations of formalism in the pre-democratic administrative law and, in relation to each, indicates the extent to which the courts have moved away from such reasoning.

### 4.3 FORMALISM IN ADMINISTRATIVE LAW BEFORE AND AFTER 1994

‘[T]he Constitution does not abolish the public/private distinction, or the rule that applicants must have standing, or the distinction between facts that are legally relevant and facts that are not. It does, however, require us to reconsider our understanding of these concepts and principles in the light of the Constitution.’\(^{61}\)

(a) *The distinction between review and appeal and its ramifications*

In his ground-breaking article of 1971, Dugard gives several examples of curial and extracurial statements expressing the judges’ reluctance to ‘sit in judgment on matters of policy’ and to give politics ‘as wide a berth as their work permits’.\(^{62}\) This is no doubt typical of judges in a broadly autonomous legal order, as they may be expected to ‘stress and celebrate

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\(^{58}\) Langa (note 43 above) 357.

\(^{59}\) Hoexter ‘Judicial Policy Revisited’ (note 44 above) 282 and 285.

\(^{60}\) As shown, for instance, by Forsyth’s recent defence of it: see Christopher Forsyth ‘Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law’ (2007) 66 *Cambridge Law Journal* 325, discussed at 1.5(c) above.


\(^{62}\) Dugard ‘Positivism and Civil Liberty’ (note 29 above) 187, with reference to statements by Rumpff JA in *Publications Control Board v William Heinemann Ltd* 1965 (4) SA 137 (A) at 156, Steyn CJ in *S v Tuhadeleni* 1969 (1) SA 153 (A) at 172 and several others.
their peculiarly legal, nonpolitical functions’. But in South African administrative law, as in other systems of the common-law family, the law/policy divide was more often expressed in a less explicit and more ‘coded’ fashion: in the fundamental dichotomy between review and appeal, process and substance, legality and merits.

Administrative-law review, as we all know, is supposed to address only legality (form) and not the merits (substance) of a decision – the latter being the preserve of administrators themselves and ultimately of policy-makers in the executive branch of government. It is hardly surprising, then, that the courts zealously maintained the review/appeal distinction before 1994. In their anxiety to uphold the distinction, however, the courts tended to exaggerate it. They believed, or pretended to believe, in the possibility of keeping the merits entirely out of an inquiry into the legality of an administrative decision.

Today the review/appeal distinction continues to be regarded as an incident of the separation of powers, a doctrine that infuses the democratic Constitution, and on that basis it undoubtedly remains fundamental to South African administrative law. What has changed, however, is the uncritical attitude of the pre-1994 era to the legality/merits dichotomy – for in recent years even judges of the highest courts have been prepared to admit its porousness in the context of judicial review. As is shown below, the courts have also abandoned a number of other artificial distinctions inspired by the basic review/appeal distinction.

(i) The pre-democratic era

Although the distinction between review and appeal does not seem to have been drawn so clearly in the nineteenth century, the South African courts of the twentieth century increasingly insisted on it. Appeal and review became established as entirely different remedies, the first directed at the merits of the decision and the second merely at the legality of the process, or the manner in which the decision had been arrived at.

The gulf to be maintained between legality and the merits soon came to inform every area of judicial review in administrative law. It guided the courts’ traditional preference, on setting aside a decision, for remitting it to the administrator as opposed to substituting its own

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63 Nonet & Selznick (note 12 above) 59.
64 The separation of powers was expressly mandated by Constitutional Principle VI in the interim Constitution and, while it was not expressly included in the 1996 Constitution, it clearly underlies our constitutional order: Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) paras 82-3.
65 Baxter (note 10 above) 305n23.
and it informed the primacy of internal remedies at common law and the requirement that internal remedies be exhausted before judicial review is resorted to. Most obviously, it explained the grounds of review on which courts were prepared to set aside administrative action and their reluctance to extend the grounds to encompass the realm of policy or substance. While the courts could examine issues such as the impartiality of the decision-maker and the admissibility of the evidence taken into account, they could not legitimately interfere with an administrative decision merely because they believed it to be ‘wrong or inequitable’. As Innes ACJ put it a century ago, ‘it is settled law that where a matter is left to the discretion or the determination of a public officer . . . it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own’. It was on this basis that the courts disavowed review on the ground of reasonableness for administrative action except where delegated legislation was concerned. In that instance review could be justified on the assumption that the courts were simply enforcing the will of the sovereign legislature, for Parliament clearly did not intend its delegated lawmaking power to be used in unreasonable ways. In relation to other types of action, however, reasonableness was regarded as ‘insufficient ground for interference’, as stated in the locus classicus, the Union Steel case. Instead, the courts treated gross unreasonableness as a symptom of some other defect, such as ‘failure to apply the mind’. Such well-established grounds of abuse of discretion were regarded as less intrusive than reasonableness itself. In reality, however, those grounds also invited close scrutiny of the merits. Merits review in this sense, the sense of judicial scrutiny, went on all the time – even in the very case that proposed the deferential test for gross unreasonableness to a ‘striking degree’.

The review/appeal distinction also militated against the review of errors of law and fact, which was regarded as tantamount to interference with the merits and the usurping of

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67 The requirement is discussed at 3.3(c)(ii) above.
68 Steyn v City Council of Johannesburg 1934 WLD 143 at 146-7.
69 Shidiack v Union Government (Minister of the Interior) 1912 AD 642 at 651.
70 See further at 2.3(b) above and (on the classification of functions) at (b) below.
72 Stratford JA in Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd 1928 AD 220 at 236. The development much later of a test for the reasonableness of ‘purely judicial’ decisions could be explained on the basis that judges were particularly well qualified to review such decisions.
74 National Transport Commission v Chetty’s Motor Transport (Pty) Ltd 1972 (3) SA 726 (A).
functions properly delegated to the administration. Unsurprisingly, the South African courts soon embraced the distinction drawn by their English counterparts between ‘jurisdictional’ and ‘non-jurisdictional’ errors.\textsuperscript{75} A court was entitled to intervene in the case of the former type of error, for if administrators arrogated to themselves powers that they did not have, or abdicated power that they should have exercised, they acted unlawfully. However, if a decision-maker made an error in the course of deciding a matter which it had jurisdiction to decide, or ‘within jurisdiction’, that was a different matter altogether: administrators had to be regarded as having jurisdiction not only to make the right decision, but also ‘to go wrong’.\textsuperscript{76} As Corbett JA finally acknowledged in the context of errors of law, this distinction was both difficult to discern and highly manipulable.\textsuperscript{77}

Similar formalistic reasoning may explain the reluctance of the pre-democratic courts, discussed above,\textsuperscript{78} to scrutinise the motives of administrators as opposed to the purposes pursued by them. As Baxter has noted, there is a general tendency amongst lawyers to avoid the concept of motive on account of its subjective nature.\textsuperscript{79} But the courts’ reluctance to investigate the motives of administrators may also have stemmed from their determination not to stray from legality to the merits – their sense that where powers had undoubtedly been conferred on an administrator, there was no warrant for going behind those powers to investigate the actuating reasons for the administrative conduct.\textsuperscript{80} In such a situation unworthy motives could be regarded as being ‘within jurisdiction’, as it were.

\textit{(ii) Developments since 1994}

As already noted, the review/appeal distinction remains fundamental in South African administrative law. It has significant practical effect in terms of the relief offered by an appeal as opposed to a review, and the courts continue to insist on it – particularly in the context of review for reasonableness (something now mandated by s 33 of the Constitution itself) and related grounds.\textsuperscript{81}

\textsuperscript{75} See further at 2.2(c) and (d) above.
\textsuperscript{76} Lord Reid in \textit{Armah v Government of Ghana} [1968] AC 192 at 234.
\textsuperscript{77} \textit{Hira v Booysen} 1992 (4) SA 69 (A) at 90D-I.
\textsuperscript{78} At 2.2(b).
\textsuperscript{79} Baxter (note 10 above) 512.
\textsuperscript{80} As Roos JA said in \textit{Feinstein v Baleta} 1930 AD 319 at 326, in the absence of a charge of bad faith or corrupt motive ‘a Court of law should not investigate the reasons actuating or the purpose impelling the municipality in exercising powers undoubtedly conferred upon it’.
\textsuperscript{81} See eg \textit{Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa} 2004 (3) SA 346 (SCA) para 20; \textit{Foodcorps (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management} 2006 (2) SA 191 (SCA) para 12; \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs} 2004 (4) SA 490 (CC) para 45.
However, commentators have readily acknowledged the partial nature of legality/merits distinction.\textsuperscript{82} Even judges have admitted that the distinction is not clear-cut. In relation to s 24(d) of the interim Constitution, for instance, Froneman J pointed out frankly in \textit{Carephone (Pty) Ltd v Marcus NO} that ‘value judgments will have to be made which will, almost inevitably, involve the consideration of the “merits” in some way or another’.\textsuperscript{83} The highest courts, too, have admitted that the merits must play a role, but have stopped short of denying the distinction for fear of subverting the separation of powers. The Constitutional Court has allowed that review for reasonableness under s 33(1) gives the court’s review functions ‘a substantive as well as a procedural ingredient’, but has at the same time insisted that ‘the distinction between appeals and reviews continues to be significant’.\textsuperscript{84} So far, the most candid statement has come from the Supreme Court of Appeal in \textit{Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration}.\textsuperscript{85} Here, in the context of review for rationality, Cameron JA said this:

‘[T]he line between review and appeal is notoriously difficult to draw. This is partly because process-related scrutiny can never blind itself to the substantive merits of the outcome. Indeed, under the PAJA the merits to some extent always intrude since the court must examine the connection between the decision and the reasons the decision-maker gives for it, and determine whether the connection is rational. \textit{That task can never be performed without taking account of the substantive merits of the decision.}\textsuperscript{86}'

Nevertheless he, too, added that ‘[t]his does not mean that PAJA obliterates the distinction between review and appeal’.\textsuperscript{87}

While the distinction may not have been obliterated, it is noteworthy that various other formalistic distinctions spawned by the review/appeal dichotomy have fallen away or been abandoned since 1994. First, the PAJA removes any doubt about the status of ulterior motive


\textsuperscript{83} \textit{Carephone (Pty) Ltd v Marcus NO} 1999 (3) SA 304 (LAC) para 36. In the same context of s s 24(d) of the interim Constitution, see too the remarks of Spoelstra J in \textit{Kotzé v Minister of Health} 1996 (3) BCLR 417 (T) 425F-G and those of Van Deventer J in \textit{Roman v Williams NO} 1998 (1) SA 270 (C) 281E-F.

\textsuperscript{84} \textit{Bato Star Fishing v Minister of Environmental Affairs} (note 81 above) para 44.

\textsuperscript{85} \textit{Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration} 2007 (1) SA 576 (SCA).

\textsuperscript{86} Ibid para 31. This dictum was not specifically adverted to when the matter went to the Constitutional Court on appeal in \textit{Sidumo v Rustenburg Platinum Mines Ltd} 2008 (2) SA 24 (CC), but there was significant support for the proposition that reasonableness review necessarily entails scrutiny of the merits (para 109).

\textsuperscript{87} Ibid para 32, with reference to \textit{Trinity Broadcasting v ICASA} (note 81 above) para 20.
as a ground of review.\textsuperscript{88} Secondly, in the context of errors of law the courts have not relied on the jurisdictional/non-jurisdictional distinction since the 1992 decision in \textit{Hira v Booysen}\textsuperscript{89} (whose effect was subsequently codified in s 6(2)(d) of the PAJA), and non-jurisdictional mistakes of fact have been reviewable since the bold 2003 decision of the Supreme Court of Appeal in \textit{Pepcor Retirement Fund v Financial Services Board}.\textsuperscript{90} Again, however, the erosion of the jurisdictional/non-jurisdictional distinction has not been accompanied by commensurate judicial recognition of the erosion of the more fundamental review/appeal dichotomy. On the contrary, the court insisted in \textit{Pepcor} that review of material mistake of fact ‘should not be permitted to be misused in such a way as to blur, far less eliminate’\textsuperscript{91} the distinction between appeal and review. In fact it is far from clear that the distinction can be upheld in any meaningful way in the context of this type of review. The court sought to demonstrate the continuing relevance of the review/appeal distinction by indicating that review for mistake of fact would not operate ‘where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, had been entrusted to a particular functionary’.\textsuperscript{92} However, it is difficult to see how such a situation could arise without the mistake’s being or becoming a jurisdictional one – and the \textit{Pepcor} court made it plain that ‘these limitations . . . do not extend to what have come to be known as jurisdictional facts’, a category that ‘it will continue to be both necessary and desirable to maintain’.\textsuperscript{93}

As already explained in the context of review for reasonableness,\textsuperscript{94} my own view is that the legality/merits distinction can be sustained fully only when review takes place on a formal or technical ground such as lack of authority or failure to observe a mandatory legal requirement – for it is only then that a court can avoid scrutiny of the merits. It is otherwise when the ground of review gives scope for judicial estimation or choice. For instance, it may be impossible to tell without entering the merits of the decision whether sufficient weight was given to a relevant consideration, or whether an ulterior purpose was pursued, or whether there was rigid adherence to a policy or a precedent; and the same is true of review for error of law or fact. A more realistic approach, I suggest, would be to accept the illusory nature of the distinction at the stage of scrutiny and attempt rather to observe its spirit at the point of

\begin{itemize}
\item Section 6(2)(e)(iii).
\item Note 77 above.
\item \textit{Pepcor Retirement Fund v Financial Services Board} 2003 (6) SA 38 (SCA).
\item Ibid para 48.
\item Ibid.
\item Ibid.
\item At 2.3(c)(iii) above.
\end{itemize}
granting a remedy such as setting aside. This recognises that scrutiny on its own – even of the merits – is harmless.\textsuperscript{95} It is only when that scrutiny is translated into judicial intervention that there is a risk of usurping the powers legitimately conferred on administrators.

(b) The classification of functions

(i) The pre-democratic era

The classification of functions is surely the most notorious example of formalism in pre-democratic South African administrative law. This mechanical device, inherited from English law,\textsuperscript{96} was used by the courts in an effort to avoid the political choice inherent in questions about what administrative justice requires in particular cases – and also to restrict those requirements. Administrative conduct was divided up in accordance with the three basic functions of government, legislative, executive and judicial, and nuance was added by means of subcategories such as ‘quasi-judicial’ and ‘purely administrative’. The theory was that once an administrative act had been classified, the requirements of administrative justice applicable to it would be fixed and certain. So, in order to find the legal answer to a problem, all the judge apparently had to do was classify the action which gave rise to the problem. On this approach, as Davis remarks, ‘[t]he reviewing court became no more than a jurisprudential slot machine into which was placed the nature of the dispute . . . and out popped the answer to the review application’.\textsuperscript{97}

As indicated in Chapter 2, the conceptualism inherent in this approach seriously inhibited the development of administrative justice in relation to reasonableness\textsuperscript{98} and procedural fairness.\textsuperscript{99} It also produced all-or-nothing results. As far as reasonableness is concerned, the courts acknowledged a venerable test for the review of ‘legislative’ decisions\textsuperscript{100} and much later a fairly liberal test for ‘purely judicial’ decisions,\textsuperscript{101} but none at all for the reasonableness of ‘purely administrative’ decisions\textsuperscript{102} – by far the largest category in practice. Meanwhile, natural justice was reserved for decisions of at least a ‘quasi-judicial’

\textsuperscript{95} Hoexter ‘Future of Judicial Review’ (note 73 above) 512; ‘Judicial Policy Revisited’ (note 44 above) 298.
\textsuperscript{96} See The Rt Hon The Lord Woolf, Jeffrey Jowell QC & Andrew Le Sueur De Smith’s Judicial Review (2007) 975ff.
\textsuperscript{97} Dennis Davis ‘To Defer and When? Administrative Law and Constitutional Democracy’ 2006 Acta Juridica 23 at 34.
\textsuperscript{98} See at 2.3(b).
\textsuperscript{99} See at 2.4(b)(i).
\textsuperscript{100} This was the test laid down in \textit{Kruse v Johnson} [1898] 2 QB 91 at 99-100.
\textsuperscript{101} In terms of the ‘extended formal standard’ explored in \textit{Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika} 1976 (2) SA 1 (A). This test resembled the ‘substantial evidence’ test of American administrative law.
\textsuperscript{102} \textit{Union Government v Union Steel Corporation} (note 72 above).
nature. Mere applicants and others who were unable to demonstrate the presence of an ‘existing right’, the hallmark of quasi-judicial decisions, were simply not entitled to be treated fairly.\textsuperscript{103}

It is obvious that the classification of functions operated to the detriment of victims of administrative action who were denied altogether the benefits of reasonableness and fairness. What is less obvious was the stultifying effect of this all-or-nothing approach on judicial review in general. The classification of functions retarded the development of the principles of good administration and their obverse, the grounds of review, because for decades it allowed judges to avoid substantive questions about what reasonableness or fairness demanded in particular cases.\textsuperscript{104} The emphasis was on the label to be attached to the problem, as the right label would supposedly yield up the right (restrictive) answer; and this meant that the all-important question ‘What does administrative justice require in this situation?’ was not asked.\textsuperscript{105} While the classification of functions held sway, little or no effort went into working out the appropriate content of lawfulness, reasonableness and fairness in particular cases.

Fortunately, the device fell out of favour in the late 1980s, at least in the context of procedural fairness, as the Appellate Division began to admit (a quarter of a century later than the English courts)\textsuperscript{106} just how unhelpful the process of classification was.\textsuperscript{107} By 1991, in the important case of \textit{South African Roads Board v Johannesburg City Council}, Milne JA was able to say that the Appellate Division had clearly ‘moved away from the classification of powers . . . in order to determine whether the audi principle applies’.\textsuperscript{108} In the context of reasonableness there was no such epiphany, but there was steadily mounting evidence of the courts’ willingness to apply the standard for ‘purely judicial’ decisions well outside that category.\textsuperscript{109}

(ii) Developments since 1994

The discrediting of the system of classification towards the end of the pre-democratic era has ensured that the evils of formalistic categorisation are well understood today. Far from dying out, however, the categories ‘legislative’, ‘executive’ and ‘judicial’ have been reinvigorated in a new context: that of s 33 of the Constitution (and its predecessor, s 24 of the interim

\textsuperscript{103} As for instance in \textit{Laubscher v Native Commissioner, Piet Retief} 1958 (1) SA 546 (A).
\textsuperscript{104} Hoexter ‘Principle of Legality’ (note 2 above) 171.
\textsuperscript{105} Ibid 169.
\textsuperscript{106} \textit{Ridge v Baldwin} [1964] AC 40.
\textsuperscript{107} Especially in \textit{Administrator, Transvaal v Traub} 1989 (4) SA 731 (A) at 763H-I.
\textsuperscript{108} \textit{South African Roads Board v Johannesburg City Council} 1991 (4) SA 1 (A) at 10J.
Constitution) and its undefined threshold concept of ‘administrative action’. On the apparent basis that a supreme, justiciable Constitution with a full-scale Bill of Rights reduces the workload formerly carried by administrative-law review, the Constitutional Court has since 1994 sought to restrict the concept of ‘administrative action’ while giving it meaning. It has set about this essentially by distinguishing administrative action from legislative,\(^{110}\) executive\(^{111}\) and judicial\(^{112}\) action. It has also indicated the factors to consider in the diagnosis of administrative action: the source of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it relates to (high) policy matters – which are not administrative – or to the implementation of legislation, which is characteristic of administrative action.\(^{113}\)

As the court itself predicted,\(^{114}\) the inquiry has not proved an easy exercise and there have been some awkward diagnoses. One of these was in *Pharmaceutical Manufacturers Association*, where the court had to pronounce on a presidential proclamation bringing a statute into operation.\(^{115}\) As a piece of delegated legislation, such a proclamation would have been regarded as a central instance of administrative activity before 1994. The Constitutional Court held, however, that it was legislative rather than administrative action. It drew a distinction between the proclamation, which was unquestionably directed at the implementation of legislation, and an ‘antecedent decision’ to bring the statute into operation; and it reasoned that that decision was not administrative, for it required a ‘political judgment’ as to when the statute should take force.\(^{116}\) The trouble with this distinction, however, is its artificiality. Not only is the proclamation itself the only evidence of the antecedent decision, but it is easy to think of typically administrative tasks that require the making of a ‘political judgment’ – from refusing a visa to awarding a casino licence. Arguably, only the most mechanical of tasks will not require such a judgment.

The application of the labels ‘legislative’, ‘executive’ and ‘judicial’ has become no easier since then. In the *New Clicks* case the court was signally unable to agree on the status of delegated legislation in the form of regulations (though here the inquiry was conducted

\(^{110}\) See eg *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (*Fedsure*) and *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers Association*).

\(^{111}\) See eg *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (the *SARFU* case); *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC).

\(^{112}\) See eg *Nel v Le Roux NO* 1996 (3) SA 562 (CC); *Sidumo v Rustenburg Platinum Mines* (note 86 above).

\(^{113}\) The *SARFU* case (note 111 above) para 143.

\(^{114}\) Ibid.

\(^{115}\) Note 110 above.

\(^{116}\) Ibid para 79.
under the definition of administrative action in the PAJA rather than under s 33). More recently there was sharp disagreement in the Sidumo case about whether an arbitral decision of the Commission for Conciliation, Mediation and Arbitration amounts to ‘judicial’ rather than administrative action. Cases such as these demonstrate the intrinsic difficulty of the administrative action inquiry and cast doubt on the value of attempting to distinguish such action from legislative, executive and judicial action. Nevertheless, the labels continue to be used and have indeed been explicitly incorporated into the definition of administrative action in the PAJA. In this detailed statutory definition all the legislative functions of Parliament, a provincial legislature and a municipal council are excluded from the realm of administrative action, as are the judicial functions of a judicial officer of a court, a special tribunal or a traditional leader. Similarly, all the executive powers of a municipal council are excluded, while certain specified powers and functions of the national and provincial executives are excluded.

The exclusions just outlined were dictated by the jurisprudence of the Constitutional Court in relation to s 33 rather than being inspired by the system of classifying functions. However, the PAJA’s definition of administrative action may also be thought to revert to that system more directly. The statute defines one of the elements of administrative action, a ‘decision’, to include decisions ‘of an administrative nature’, thus possibly aiming to exclude all decisions of a non-administrative nature – which is to say of a ‘legislative’, executive’ or ‘judicial’ nature. This formalistic interpretation gains some support from the Australian origins of the definition of ‘decision’, since the relevant statute, the Administrative Decisions (Judicial Review) Act 1977 (Cth), does not apply to delegated legislation (‘legislative’ administrative acts). This view ought to be resisted, however, as it seems perverse to read a conceptual approach into the Act on such flimsy evidence. It is belied in any case by the specific exclusions listed above – for on the formalistic interpretation there would be no need

117 Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC) (hereafter New Clicks (CC)). Chaskalson CJ wrote strongly in favour of regarding delegated legislation as administrative action both in terms of s 33 and the PAJA. Most of the justices confined themselves to the PAJA, however, and in this regard there was a divergence of views. One justice agreed with Chaskalson CJ; three justices were prepared to regard the particular regulations before them as administrative action, but not to answer the wider question whether all regulations so qualify; one justice preferred to see subordinate legislation being governed by the principle of legality; and five reasoned that it was unnecessary to decide whether the PAJA was applicable.
118 In Sidumo v Rustenburg Platinum Mines (note 86 above) a majority of five justices found that such decisions were administrative action under s 33, while the other four saw them as ‘judicial’.
119 Section 1(dd) of the PAJA.
120 Section 1(ee) of the PAJA.
121 Section 1(cc) of the PAJA.
122 Section 1(aa) and (bb) of the PAJA.
for them. It is also salutary to remember that in the New Clicks case, Chaskalson CJ at least regarded the phrase ‘of an administrative nature’ as bringing regulation-making within the scope of the definition of ‘decision’ rather than as excluding it from the definition.124

(c) The rules of standing

(i) The pre-democratic era

In Chapter 3 it was shown that in the pre-democratic era, access to judicial redress in administrative law was frequently hampered by the common-law rules of standing. In terms of these rules the applicant ran the risk of being non-suited unless he or she could demonstrate a ‘sufficient, direct and personal’ interest in the case. These qualifications developed in the context of private-law litigation and are not inappropriate to the type of relief sought in such cases.125 Conversely, they make little sense in litigation of a public nature, particularly where the focus is, or ought to be, on the legality of administrative conduct.126 Notwithstanding their inappropriateness, however, the qualifications were applied strictly and in such a way as to deny any interest in legality itself.127 This, I would suggest, is further evidence of the courts’ attraction to formalism: in this instance, the use of formal, technical barriers to obviate an inquiry into matters of policy.

While ‘floodgates’ reasoning is a more common explanation for the existence of the strict common-law requirements of standing, this rationale has been so thoroughly discredited that it hardly merits serious consideration.128 Another familiar rationale is that ‘unqualified’ litigants are more likely to bring weak or half-baked actions and thus to create bad precedents. But this rationale is belied by the practice of divorcing the issue of standing from the merits, not to mention the courts’ traditional reluctance to allow associations to represent their members.129 A far more convincing way of accounting for the common-law rules of standing is that they give effect to notions of justiciability, or what issues are suitable for resolution by

124 New Clicks (CC) (note 117 above) para 128, and see para 467 in the judgment of Ngcobo J.
125 As recognised by O’Regan J in her separate concurring judgment in Ferreira v Levin NO 1996 (1) SA 984 (CC) para 229.
126 Cheryl Loots ‘Standing, Ripeness and Mootness’ in Stuart Woolman et al (eds) Constitutional Law of South Africa 2 ed Chapter 7 (OS 02-05) at 7--2.
127 See at 3.2(d)(i).
128 See Baxter (note 10 above) 666, especially n149, and see the remarks of Pickering J in Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa 1996 (3) SA 1095 (Tk) at 1106E and G-H.
129 See at 3.2(d)(v).
a court of law. The rules are thus used consciously or unconsciously to reinforce established notions of the legitimate function of the judiciary.

Whether they did so consciously or not, it is evident that before 1994 the South African courts were inclined to apply the rules of standing more strictly in high-policy areas with a strong political flavour and to be more relaxed about standing in matters where government policy was not so directly in issue. For instance, it was clear to Cameron, writing in the context of the states of emergency of the 1980s, that the rules of standing could be ‘manipulated by judges who feel disinclined to hear certain cases or to decide certain issues for reasons which are not openly expressed’. In a similar vein, Plasket observes that it is a mistake to view the requirements simply as ‘neutral procedural provisions’. The private-law ideology that permeates the rules of standing (and the concomitant unwillingness to recognise an interest in legality itself) tends to support the orthodox rule-of-law or ‘watchdog’ model of the judicial function that dominated South African administrative law before 1994. So, in the words of Cane, the emphasis on ‘private legal right’ in the rules of standing reinforces the idea that ‘[t]he courts are there to adjudicate individuals’ disputes, not to decide issues of policy’.

As suggested in Chapter 3, this vision was not subscribed to uniformly. There were exceptions to it, such as the common-law presumption of ‘special damage’ and the well-established principle that ratepayers have an interest in the actions of their local authorities. There was also evidence towards the end of the apartheid era of a judicial willingness to relax the rules, demonstrated most clearly in the case of Jacobs v Waks. Notwithstanding such glimmers of light, however, the essential philosophy of the rules of standing remained unchanged until the interim Constitution came into force in 1994.

(ii) Developments since 1994

The generous and explicit terms of s 38 of the 1996 Constitution and its predecessor, s 7 of the interim Constitution, ought surely to have been enough to sweep away the formalism

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133 Cane ‘The Function of Standing Rules’ (note 130 above) 307.
134 Established in Patz v Greene & Co 1907 TS 427.
135 Director of Education, Transvaal v McCagie 1918 AD 616.
associated with the rules of standing at common law. But even now the courts seem reluctant
to abandon their old philosophy, and the discussion in Chapter 3 shows that there is
continuing uncertainty as to the role of s 38 in cases where the Constitution is not of direct
application. However, recent cases such as Permanent Secretary, Department of Welfare,
Eastern Cape v Ngxuza suggest a new judicial impatience with technical barriers to the
achievement of administrative justice.137 In this case the Supreme Court of Appeal showed
itself to be entirely undaunted by various practical difficulties associated with a class action,
such as the definition of the class and the problem of extra-jurisdictional applicants.138
Revealingly, too, the court was scathing in its criticism of the state’s obstructionist approach
to the action (a challenge to the suspension of disability grants) and for conducting the case as
though it were at war with its own citizens.139

It is interesting to note that a similar impatience is suggested by the courts’ treatment
of s 7(2) of the PAJA which, like the time limit in s 7(1), is a considerably stricter and more
imposing barrier to judicial review than its judge-made counterpart.140 In relation to other
barriers to review traditionally imposed by the legislature, the discussion in Chapter 3
indicates that the presence of s 34 of the Constitution (formerly s 22 of the interim
Constitution) has had a decisive effect on the validity of ouster clauses, limitation clauses and
the like. Today these devices will pass constitutional muster only if they can be justified in
terms of the limitation clause.

(d) The public/private distinction and the treatment of contracts in administrative law

(i) The pre-democratic era

Critical scrutiny has revealed that the distinction between public and private legal realms is
not ‘one monolithic cleavage’141 but highly contingent and manipulable.142 Such manipulation
is evident in the jurisprudence of the pre-democratic era, when the courts frequently made use
of the public/private distinction so as to exempt administrators from the duties ordinarily
imposed by public law. The practice may well have informed the inclusion of one of the items

137 Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza 2001 (4) SA 1184 (SCA).
139 Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza (note 137 above) para 15, and see also
paras 14, 21 and 26-7.
140 At 3.3(c)(ii).
141 Alfred Cockrell ‘“Can you Paradigm?” – Another Perspective on the Public Law / Private Law Divide’ 1993
Acta Juridica 227 at 245.
142 See especially the various papers on the public/private distinction collected in (1982) 130 University of
flagged for further attention in the Breakwater Declaration: ‘the precise scope and implications of the public/private distinction in administrative law’.

Perhaps the most notorious instance of manipulation of the distinction is Mustapha v Receiver of Revenue, Lichtenburg, a case in which a majority of the Appellate Division held that it was lawful for a Minister to revoke a permit for a racially discriminatory motive. This was not done by asserting the general irrelevance of ‘motive’ as opposed to ‘purpose’ in public law (a proposition that had considerable support at the time), but rather by characterising the matter as one of ‘pure contract’, and thus as belonging to the realm of private rather than public law. While the permit in question was clearly governed by statute, the court depicted the granting of the permit as an ‘acceptance’ of an ‘offer’ made by the applicant for the permit – an awkward characterisation at best. It then distinguished between entry into the contract, an issue admittedly governed by statute, and exit from the contract, which it insisted was governed solely by the law of contract. The court went on to reason that motive was generally irrelevant in the law of contract unless the contract itself provided otherwise. So, in the absence of an express or implied term to the contrary, the Minister’s motive in revoking the permit was of no consequence.

Mustapha is by no means the only example of such ‘purely contractual’ reasoning in the pre-democratic era. Even in the late 1980s and early 1990s there were a number of cases (many of them relating to natural justice) which illustrated the tendency to ignore the connection between a contract entered into by a public body and the enabling legislation behind the contract. The best that can be said about these judgments is that the contractual

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143 Item iii of the Areas Requiring Further Consideration. While item iii of the Points of Departure called for the accountability of exercises of public power, its wording suggests that the Breakwater participants did not have this particular type of manipulation in mind here but were instead concerned about the use of public power by ‘nominally private bodies’. In fact the latter was an area in which the pre-1994 jurisprudence was surprisingly sophisticated. This is shown by cases such as Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange 1983 (3) SA 344 (W), in which a decision of the stock exchange – a non-statutory body – was held to be reviewable partly on the basis of the important public function performed by it.

144 Mustapha v Receiver of Revenue, Lichtenburg 1958 (3) SA 343 (A)

145 See 2.2(b) above.

146 For a full exposition of this classificatory approach in South African law – the categorisation of state commercial activity as either contractual or administrative – see Geo Quinot The Judicial Regulation of State Commercial Activity LLD Thesis, University of Stellenbosch (2007). Quinot criticises the current approach for its excessive formalism and favours an approach in which judges would make their choices with open and direct reference to the substantive considerations informing those choices.

147 Mustapha v Receiver of Revenue (note 144 above) at 356.

148 As pointed out in Hoexter ‘Contracts’ (note 5 above) 601-2.

149 Mustapha v Receiver of Revenue (note 144 above) at 357-9.

150 Strong examples discussed in Hoexter ‘Contracts’ (note 5 above) 599ff are Sibanyoni v University of Fort Hare 1985 (1) SA 19 (Ck), Mkhize v Rector, University of Zululand 1986 (1) SA 901 (D), Scholtz v Cape Divisional Council 1987 (1) SA 68 (C) and Naran v Head of the Department of Local Government, Housing and Agriculture (House of Delegates) 1993 (1) SA 405 (T).
characterisation was far more apt than in *Mustapha*; the worst, that they tended to assert a non-existent freedom of contractual choice and turned on technical distinctions. *Scholtz v Cape Divisional Council*, a case relating to the lease of council housing, illustrates both of these tendencies.\(^{151}\) Here, in the absence of a statutory *duty* to provide housing to indigent persons, as opposed to a mere statutory *power* to do so, the hapless tenant’s rights were held to derive purely from contract, and the court held that he could be evicted for any reason or none.\(^{152}\)

However, the same period saw the emergence and ultimate victory of a ‘public-law’ approach that tended to subordinate the contractual relationship to the rules of administrative law. Exemplified early on by the dissenting judgment of Schreiner JA in *Mustapha*, in which he stressed the statutory source of the Minister’s powers,\(^{153}\) the public-law approach was most famously upheld by the Appellate Division in *Administrator, Transvaal v Zenzile*.\(^{154}\) Here Hoexter JA rejected the argument that a public-sector dismissal was a matter of pure contract falling beyond the reach of administrative law, and held that a contract founded on statutory powers was ‘no ordinary contract’.\(^{155}\) It must be conceded that (although the court did not fall prey to it)\(^{156}\) there is danger here too: the public-law approach tends to foster formulaic reasoning that relies on a single feature – the statutory source of the power to contract – which is present in every case (or almost every case)\(^{157}\) involving an administrator. Nevertheless, this approach is surely preferable to the extreme artificiality of purely contractual reasoning.\(^{158}\)

**(ii) Developments since 1994**

Somewhat surprisingly, purely contractual reasoning has survived into the democratic era. It was relied on in the troublesome case of *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* in the context of an outsourcing agreement entered into pursuant to

\(^{151}\) Note 150 above.

\(^{152}\) Ibid at 73-4. For criticism, see Bede Harris & Cora Hoexter ‘Administrative Law in Contractual Disguise’ (1987) 104 SALJ 557 and Hoexter ‘Contracts’ (note 5 above) 604.

\(^{153}\) *Mustapha v Receiver of Revenue* (note 144 above) at 350.

\(^{154}\) *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A). See also *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A) and *Ramburan v Minister of Housing (House of Delegates)* 1995 (1) SA 353 (D).

\(^{155}\) *Administrator, Transvaal v Zenzile* (note 154 above) at 35B-C.

\(^{156}\) Hoexter JA also adverted to substantive reasons why it might be desirable to hear the dismissed workers in this case, particularly the disciplinary nature of the matter (ibid at 36).

\(^{157}\) *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) offers a rare example of an employment contract that was apparently not governed by statute after the repeal of the South African Transport Services Contract of Service Act 41 of 1998.

\(^{158}\) Hoexter ‘Contracts’ (note 5 above) 608.
to a tender process. In terms of the contract a private firm would collect levies on behalf of a local council and claim commission on the levies collected. After some months the council cancelled the contract on the basis of material breach, alleging that the firm had submitted fraudulent claims for commission amounting to thousands of rands. The court a quo held that the firm had a right to be heard before the contract was cancelled. However, Streicher JA held for the Supreme Court of Appeal that while the creation of the contract had involved the exercise of public power, its termination did not. Unlike Zenzile and similar cases in which the power exercised had been sourced in statute, the termination in this case entailed the exercise of private, contractual power. This meant that it did not constitute administrative action for the purposes of s 33 of the Constitution, and so it did not attract the right to procedural fairness.

The court’s reasoning is this regard seems both formalistic and unconvincing. In fact there were several features suggesting that the cancellation of the contract did entail the use of public power as it is understood today. For one thing, the relevant legislation not only required the council to collect levies but made express provision for outsourcing the task contractually. Furthermore, the legislation specifically allowed for cancellation of such a contract on grounds including fraud. Far more cogent is the court’s point that when the council concluded the contract it was ‘not acting from a position of superiority or authority by virtue of its being a public authority’ and, when it cancelled the contract, was in no stronger position than if it had been a private institution.

In its subsequent, far more nuanced decision in Logbro Properties CC v Bedderson NO, a case concerning action taken by a tender board, the Supreme Court of Appeal chose to emphasise this aspect of Cape Metro and to retreat from the ‘general proposition that a public authority . . . may exercise its contractual rights without regard to public duties of fairness’. This, Cameron JA asserted, was not at all what Cape Metro stood for. That case established rather that an administrator’s invocation of a contractual power of cancellation is not an exercise of public power ‘in a contract concluded on equal terms with a major commercial

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159 Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (3) SA 1013 (SCA) (hereafter Cape Metro).
160 Metro Inspection Services (Western Cape) CC v Cape Metropolitan Council 1999 (4) SA 1184 (C) at 1195H-1196A.
161 Cape Metro (note 159 above) para 18.
162 Ibid paras 21-2, and see the discussion at (b)(ii) above.
163 See Hoexter ‘Contracts’ (note 5 above) 611 and 616-18.
164 See Cape Metro (note 159 above) para 20.
165 Ibid para 18.
166 Logbro Properties CC v Bedderson NO 2003 (2) SA 460 (SCA) para 9.
undertaking, without any element of superiority or authority deriving from its public position”. Cape Metro turned on its own facts. In Logbro, by contrast, the province had dictated the tender conditions and was undoubtedly acting from a position of superiority by virtue of being a public authority. Thus, even if the tender conditions constituted a contract (which was not in issue), the principles of administrative justice still framed the contractual relationship. Indeed, some of the province’s contractual rights, such as its entitlement to give no reasons, would ‘necessarily yield before its public duties under the Constitution and any applicable legislation’. The Logbro court took the opportunity to overrule the judgment of the majority in Mustapha, which had falsely attempted a ‘total fissure’ between contractual powers and the statute that was their source, and to affirm the dissenting judgment of Schreiner JA.

Unfortunately, the not dissimilar fissure attempted in Cape Metro has achieved popularity in the context of employment relations, initially in the Labour Court and later in the highest courts. In Transnet Ltd v Chirwa, albeit with strong opposition from some members of the Supreme Court of Appeal, Mthiyane JA relied on Cape Metro in its unreconstructed form in deciding that a public-sector dismissal was ‘based on contract’ and thus did not involve the exercise of a public power. A majority of the Constitutional Court adopted somewhat different contractual reasoning on appeal. Here Ngcobo J held that while the power was undoubtedly public, its contractual source and ‘nature’ meant that it could not qualify as administrative action under s 33 of the Constitution.

167 Ibid para 10.
168 Ibid para 8.
169 Ibid para 7.
170 Note 144 above.
171 Logbro Properties v Bedderson (note 166 above) para 13.
173 Transnet Ltd v Chirwa 2007 (2) SA 198 (SCA).
174 Ibid para 15.
175 Jafta JA concurred in this judgment. Cameron JA and Mpati DP disagreed with this view, however, and Conradie JA decided the case on a different (jurisdictional) basis.
176 Chirwa v Transnet Ltd (note 157 above).
177 Ibid para 138.
178 Ibid para 142: ‘It does not involve the implementation of legislation which constitutes administrative action.’ For criticism see Cora Hoexter ‘Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court’ (2008) 1 Constitutional Court Review 209. It is not entirely clear whether Ngcobo J was influenced by an unusual feature of the case, the absence of legislation governing the dismissal. However, it certainly played a role in the judgment of Langa CJ, for whom the contractual source was also decisive. Cf AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2007 (2) SALR 343 (CC), where the Constitutional Court rejected the idea that a decision loses its ‘public’ character simply because the most immediate source of the power happens to be a contract – and rebuked the Supreme Court of Appeal for taking a contractual view of the matter and thus putting form over substance (para 45). See in this regard Richard Stacey ‘Administrative Law in Public-Sector Employment Relationships’ (2008) 125 SALJ 307 at 316-18.
More recently, and more worryingly, Brand JA remarked in a unanimous judgment that administrative law had no role to play in the cancellation of a tender award – a startling statement reminiscent of the pre-1994 assertion by Pickard ACJ that the rules of natural justice ‘have no application in matters of contract’. Once a tender had been awarded, the court explained, the relationship between the parties was governed by the principles of contract law to the exclusion of administrative law – and this notwithstanding the tender board’s reliance on a statutory provision and on statutory grounds of cancellation. So much for the nuanced approach in Logbro, and so much for its overruling of the majority judgment in Mustapha (though neither case was mentioned by Brand JA). At the intersection of contract and administrative law, it would seem, the perceived advantages of the purely contractual approach and its simple, all-or-nothing consequences are just too strong to resist.

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The discussion above has considered four of the most conspicuous examples of formalistic legal reasoning in pre-democratic South African administrative law. It has also indicated in each instance whether and to what extent the courts have successfully moved away from such reasoning in favour of a more substantive approach. The survey reveals that while considerable progress has been made in this regard, formalistic reasoning has by no means been abandoned altogether.

In the next section it is suggested that in certain respects the PAJA actually encourages conceptualism and reverts to the restrictive and parsimonious philosophy of pre-1994 administrative law.

4.4 THE PAJA: A RETURN TO CONCEPTUALISM?

In the pre-democratic era South Africa enjoyed a system of administrative law in which almost any action was reviewable in principle. Fearful of imposing too great a burden on the administration in this way, the courts resorted to the classification of functions, discussed above, in order to restrict the application of the principles of good administration. As we have seen, that method was eventually discredited.

179 Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd 2009 (1) SA 163 (SCA) para 18. Cf the approach of the same court in MV Snow Crystal; Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal 2008 (4) SA 111 (SCA) paras 21-2; and cf also Member of the Executive Council, Department of Education, North West v K C Productions CC (B) unreported case 14/2007 of 5 March 2009 (relating to a tender).

180 Sibanyoni v University of Fort Hare (note 150 above) at 30L.
At the start of the democratic era s 24 of the interim Constitution\(^\text{181}\) conferred rights to administrative justice for the first time – rights which could be interfered with only on the strict terms set by the limitation clause.\(^\text{182}\) In view of South African history, not to mention the rarity of such rights, the provision seemed nothing short of revolutionary. But the wording of s 24 suggested continuing faith in conceptualism, as well as something less than a complete break with the parsimonious and deferential philosophy that had characterised the common law.\(^\text{183}\) It conferred the right to lawful administrative action on the widest category of people, all those whose rights or interests were affected or threatened, while the right to reasons was in similar terms except that their rights or interests had to be affected and not merely threatened. The right to procedurally fair administrative action applied where rights or legitimate expectations (but not interests) were affected or threatened, while the right to justifiable administrative action was confined to those whose rights were affected or threatened. The focus thus remained firmly on concepts such as ‘rights’, the familiar tools of the pre-democratic era and indeed of the classification of functions.

Remarking on the ‘conspicuous idiosyncrasy’ of s 24 – its calibrated application to four different classes of action – Mureinik observed at the time that it would be difficult to develop a ‘coherent theory’ to account for these variations.\(^\text{184}\) I would suggest that they demonstrated a lack of transformation of the underlying restrictive philosophy of administrative law. It may be that, steeped as they were in the prevailing legal culture, the drafters of s 24 were simply unable to imagine an alternative vision. The same cannot, however, be said of s 33 of the 1996 Constitution, which promises just administrative action in refreshingly complete terms and to ‘everyone’. Section 33 is a remarkable departure from the tradition of conceptualism.

Like s 24, however, s 33 hinges on the concept of ‘administrative action’ – a term that the Constitution fails to define. The work of the Constitutional Court in circumscribing the realm of administrative action has already been outlined in this chapter, and the difficulty of the task acknowledged. That difficulty would presumably have lessened as case law on the topic mounted up. However, the enactment of the PAJA in 2000 created a new set of

\(^{181}\) ‘Every person shall have the right to – (a) lawful administrative action where any of his or her rights or interests is affected or threatened; (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened; (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.’

\(^{182}\) Then s 33 of the interim Constitution.

\(^{183}\) Hoexter ‘Principle of Legality’ (note 2 above) 172.

\(^{184}\) Mureinik (note 46 above) 42-3.
problems, for the statute brought in a somewhat different and considerably more detailed notion of administrative action – one that seems to signal a return to conceptualism at more than one level. First, the prominence of the definition in the Act ensures that ‘regular’ or mainstream judicial review hinges more than ever on the concept. Secondly, the definition itself is replete with concepts such as ‘rights’ and ‘direct, external legal effect’, a feature that encourages a technical judicial approach rather than a substantive one. These problems then combine to create a third, for it is not easy to satisfy each one of the many elements in the definition. That, in turn, means that ‘regular’ judicial review will seldom be available, and that alternative avenues to review must be found.

The PAJA also invites conceptualism in its provisions relating to procedural fairness, ss 3, 4 and 5, where the concept of ‘rights’ again features as gatekeeper.

(a) The statutory definition of administrative action

In terms of s 1 of the PAJA,

‘“administrative action” means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect.’

A number of different elements appear from this formulation, including the need for a decision, the exercise of a public power or function, the existence of legislation or some other empowering provision, an adverse effect on rights, and a direct, external legal effect – the last a borrowing from German federal law.185 In addition to this, ‘decision’ is the subject of a separate definition: it must be a decision ‘of an administrative nature’ and made ‘under an empowering provision’ – a concept which is itself also separately defined.186 There are also nine specific exclusions relating to exercises of executive power at all three levels of government; legislative and judicial powers and functions; decisions to institute or continue a

185 Verwaltungsverfahrensgesetz (VwVfg) of 1976 § 35: see generally Rainer Pfaff & Holger Schneider ‘The Promotion of Administrative Justice Act from a German Perspective’ (2001) 17 SAJHR 59 at 70ff.

186 The term encompasses ‘a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which administrative action was purportedly taken’.
prosecution; decisions concerning the nomination, selection and appointment of judicial officers by the Judicial Service Commission; decisions taken under the Promotion of Access to Information Act 2 of 2000; and decisions taken under s 4(1) of the PAJA itself.\textsuperscript{187}

As is readily apparent, the statutory definition of administrative action is not only very narrow but also convoluted. The Supreme Court of Appeal has described it as ‘cumbersome’, and has pointed out that it ‘serves not so much to attribute meaning to the term as to surround it within a palisade of qualifications’.\textsuperscript{188} Close restriction of the realm of administrative action seems indeed to have been the main object of the legislature in its drafting of the provision.\textsuperscript{189} As a result, very many exercises of power – too many, in my view – fail to qualify as administrative action under the PAJA. For instance, delegated legislation may not amount to a ‘decision’, and for this and other reasons the courts have not yet been able to agree on the status of regulations under the definition.\textsuperscript{190} The requirement of ‘direct’ effect seems to mean that preliminary decisions will seldom or never qualify as administrative action\textsuperscript{191} – a strangely retrogressive state of affairs if one considers the progress made since 1994 regarding the reviewability of such decisions in the context of procedural fairness.\textsuperscript{192} The need for ‘external’ effect, if taken literally, can also be a rather limiting requirement,\textsuperscript{193} and on one memorable occasion it apparently prevented a court from striking down decisions to provide public funding for what amounted to a private defamation action.\textsuperscript{194}

\textsuperscript{187} Section 1(aa)-(ii) of the PAJA.

\textsuperscript{188} Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA) para 21.

\textsuperscript{189} See generally Currie Commentary (note 123 above) Chapter 3, and compare the relatively simple and inclusive definition proposed by the South African Law Commission in its Report on Administrative Justice (1999) at 15ff.

\textsuperscript{190} See especially New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO 2005 (2) SA 530 (C) (hereafter New Clicks a quo) and New Clicks (CC) (note 117 above); and see further Currie Commentary (note 123 above) para 3.33.

\textsuperscript{191} See eg Registrar of Banks v Regal Treasury Private Bank Ltd 2004 (3) SA 560 (W) at 567G-I (decision to apply for winding-up order lacked direct effect); Sasol Oil (Pty) Ltd v Metcalfe NO 2004 (5) SA 161 (W) para 13 (guidelines lacked direct effect); New Clicks a quo (note 190 above) para 41 (recommendations lacked direct effect). Cf however Oosthuizen’s Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga 2008 (2) SA 570 (T) para 24, where the court stressed that a recommendation may have direct effect.

\textsuperscript{192} See 2.4(c)(iii) above.

\textsuperscript{193} In Sasol Oil v Metcalfe (note 191 above) para 13 administrative guidelines were found to lack external effect, and in SAPU v National Commissioner of the SAPS (note 172 above) a decision to introduce a new shift system for police officers was found to be an internal matter of departmental organisation. Cf however Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services [2006] 10 BLLR 960 (LC) paras 74-5 where, in the context of a decision to transfer the applicant, Freund AJ held that ‘external’ effect should not be taken literally so as to exclude actions affecting members of the public body itself.

\textsuperscript{194} Ritchie v Government of the Northern Cape Province 2004 (2) SA 584 (NC). Although the PAJA was not, strictly speaking, applicable to the matter, the court reasoned that the decisions had to be classified as ‘policy decisions amounting to internal acts’ (para 20). For criticism, see Sarah Driver & Clive Plasket ‘Administrative Law’ 2003 AS 69 at 80ff; Cora Hoexter ‘ “Administrative Action” in the Courts’ 2006 Acta Juridica 303 at 310-11.
As suggested by the jurisprudence relating to the application of procedural fairness both before and since 1994, the requirement of an adversely affected ‘right’ has the potential to be a major stumbling block. Fortunately the Supreme Court of Appeal resisted a too literal interpretation of the concept in Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works, where Nugent JA said this:

‘While PAJA’s definition purports to restrict administrative action to decisions that, as a fact, “adversely affect the rights of any person”, I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases . . . seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. . . . The qualification, particularly when seen in conjunction with the requirement that it must have a “direct and external legal effect”, was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights . . ..’

Even with this softening of the meaning of ‘right’, however, the definition remains narrow, for every one of its many elements must be satisfied before action qualifies as administrative. This leads to under-inclusiveness, which is unsatisfactory in itself. More unfortunate still is the waste of effort, energy and time spent on the administrative action inquiry – for it is an inquiry that cannot be avoided in practice. As the ‘default setting’ for judicial review, the PAJA has to be used when it is of application; and the court cannot determine whether it is of application unless it conducts the administrative action inquiry and is satisfied in relation to each of the elements. Ironically, however, the complication and narrowness of the PAJA definition are ultimately in vain. They do not actually prevent burdens from being placed on administrators via other constraints such as the constitutional principle of legality, a feature discussed below. The definition is of no real assistance to administrators either – it is far too complicated and obscure for that.

Perhaps the most serious effect of the definition is that the threshold concept of administrative action attracts much of the courts’ attention at the expense of pressing issues of substance. It does this in more than one way. First, because the inquiry is unavoidable, a great many cases in the law reports are concerned with it at the expense of more substantive issues

195 See at 2.4 above.
196 Note 188 above, para 23. This dictum was applied to a recommendation of suspension in Oosthuizen’s Transport v MEC (note 191 above) para 30 so as to bring it within the PAJA definition.
197 At 4.5(a). The various pathways to review are outlined at 5.2(b) below.
of administrative law. The concept is inevitably regarded as the key to administrative justice. Secondly, because of its prominence the concept of administrative action tends to exercise a distracting effect: one sometimes sees cases ‘fizzling out’ once the liminal inquiry is over, with far less energy being spent on the substance of the case. The High Court decision in the *New Clicks* case is a prime example of this phenomenon. Thirdly, the focus of the court’s attention is constantly directed towards the meaning of particular concepts within the definition, and on their presence or absence, rather than on the meaning or implications of the administrative justice right itself. In short, the administrative action inquiry puts the emphasis in the wrong place. Cases that ought to have been about reasonableness or procedural fairness become cases about administrative action: cases about the meaning of concepts such as ‘rights’ and ‘direct, external legal effect’. The important questions of administrative law (What does fairness demand here? What does reasonableness mean in this context?) tend to be neglected as a result. There is a temptation, too, to use the concept to ‘solve’ problems in the manner of the classification of functions: questions about fairness and reasonableness can effectively be made to go away if the action is classified as non-administrative.

Another problem worth mentioning is the disparity between the two concepts of administrative action – the broad meaning worked out by the courts in relation to s 33 and the more detailed and constrained meaning set out in the PAJA. There is of course some common ground between the two: for instance, they have the idea of public power in common and, as already noted, several of the exclusions listed in the PAJA aim to reflect the pronouncements of the Constitutional Court on executive, legislative and judicial action. However, some of the elements of the PAJA definition have no counterpart at all in the s 33 jurisprudence.

‘Direct, external legal effect’ and the requirement of a ‘decision’ are both foreign imports. The requirement that rights must be adversely affected, too, does not resonate with the case law decided under s 33 but rather with the more parsimonious parts of the pre-1994 law. Since the main purpose of the PAJA is to ‘give effect to’ the rights in s 33, it seems clear that this disparity is not constitutionally tenable and that the PAJA must be construed consistently with the constitutional meaning. This is a logical consequence of the ‘give effect to’ mandate,

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198 In Hoexter ‘Administrative Action’ (note 194 above) at 309 it was estimated that nearly half the cases on administrative review reported in the *South African Law Reports* in 2003 and 2004 were concerned explicitly with the administrative action inquiry. In recent years it has taken up rather less space, but it remains a prominent issue.

199 *New Clicks* a quo (note 190 above), discussed in Hoexter ‘Administrative Action’ (note 194 above) 309ff.

200 In Hoexter ‘Administrative Action’ (note 194 above) at 312-13 it is suggested that this technique may unconsciously have informed the reasoning in *Cape Metro* (note 159 above).

201 As acknowledged by Nugent JA in *Grey’s Marine v Minister of Public Works* (note 188 above) para 23.

202 See at 2.4(b) above.
and also accords with the general principle that all legislation must be construed consistently with the Constitution. Where the two cannot be reconciled, the only solution is to strike down the offending parts of the PAJA. No court has yet been asked to do so, however.

(b) Sections 3, 4 and 5 of the PAJA

As explained in Chapter 2, an unfortunate feature of the PAJA is its somewhat parsimonious approach in ss 3, 4 and 5 to the application of procedural fairness. In terms of s 3(1) administrative action which ‘materially and adversely affects the rights or legitimate expectations of any person’ is required to be procedurally fair. Section 4 (governing ‘public’ fairness) and s 5 (governing reasons) are considerably more restrictive, for they omit the reference to legitimate expectations altogether and insist on ‘rights’ that are materially and adversely affected. All three of these provisions were discussed in Chapter 2, as was the effect of the case law on the meaning of ‘rights’: in particular, the tightening effect of the reasoning of the majority in Walele v City of Cape Town in the context of s 3(1), and the loosening effect on s 5 of the reasoning employed originally in Transnet Ltd v Goodman Brothers (Pty) Ltd and more recently in Kiva v Minister of Correctional Services.

These provisions of the PAJA need not be rehearsed here. What bears pointing out briefly, however, are the dangers inherent in the use of a conceptual threshold such as ‘rights’. The prominence of the concept encourages the courts to treat it as the key to the problem. So, just as in s 1 of the PAJA, the presence of such concepts encourages a technical rather than a substantive approach, and they have the same capacity to distract the courts from the substance of the case. It is also worth pointing out that the approach used in the PAJA is not the only way of limiting the potential burden of hearings on the administration. Instead of using concepts like ‘rights’ to narrow the field of application and thus limit the burden, one can adopt the opposite approach: a wide and even universal application of procedural fairness, but with a highly variable content. The notion of variability is hardly new to our law. Indeed, in relation to procedural fairness it was the orthodoxy long before the PAJA came into existence. Unfortunately, however, the theme is not pursued consistently in the PAJA.

203 In the context of s 33 of the Constitution, see eg Bato Star Fishing v Minister of Environmental Affairs (note 81 above) para 44 and Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC) paras 113-14.
204 Walele v City of Cape Town 2008 (6) SA 129 (CC): see especially at 2.4(c)(ii).
205 Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA): see at 2.5(d).
206 Kiva v Minister of Correctional Services (2007) 28 ILJ 597 (E): see at 2.5(d).
207 See Hoexter ‘Future of Judicial Review’ (note 73 above) 504.
208 On the position at common law, see Baxter (note 10 above) 542ff and Hugh Corder ‘The Content of the Audi Alteram Partem Rule in South African Administrative Law’ (1980) 43 THRHR 156.
While the Act upholds the idea of variability very successfully in s 3(2) and (3), where it lists the minimum requirements and the discretionary ingredients of fairness, that commitment is undercut by the reliance on threshold concepts in ss 3, 4 and 5 as well as in s 1. The project of the PAJA, in fact, seems to be a mixed one of variability within a framework of conceptualism.

4.5 JUDICIAL STEPS AWAY FROM FORMALISM

A theme addressed in Chapter 2 is the increasingly important role played by the constitutional principle of legality in administrative law and its replication of the principles of good administration normally found in the spheres of lawfulness and reasonableness. The judicial discovery and development of this principle are significant in the context of this chapter, too, to the extent that they suggest a movement away from formalism. The same applies to another feature of post-1994 administrative-law, the development of an explicit doctrine of deference or respect, which is an advance on the covert and/or ‘coded’ type of deference practised in the pre-democratic era.

(a) The principle of legality

The principle of legality first identified in the Fedsure case and developed in cases such as SARFU and Pharmaceutical Manufacturers’ Association has become an essential safeguard as far as South African administrative law is concerned. As explained above, the PAJA applies only to ‘administrative action’ and it defines this concept very narrowly. By contrast, the principle of legality applies to every exercise of public power. Furthermore, where the PAJA is concerned with specific, detailed provisions, the beauty of the principle of legality is its simplicity and generality. Its development so far suggests that, like the rule of law itself, the principle easily has the potential to encompass the full range of administrative-law precepts, including procedural fairness and the giving of reasons. While that point has not yet been reached, the principle and the broader concept of the rule of law already play a

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209 At 2.1, 2.2(a), 2.3(d), 2.4(a) and 2.5(d).
210 Note 110 above.
211 Note 111 above.
212 Note 110 above.
213 At 4.4.
214 See Hoexter ‘Principle of Legality’ (note 2 above) 183-4. As Sachs J indicated in his minority judgment in New Clicks (CC) (note 117 above) para 614, legality ‘is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner’ (referring to the judgment of O’Regan J in Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) paras 85-6).
crucial role in controlling action that the ordinary rules of administrative law (or at least those relating to lawfulness and rationality) do not reach for one reason or another.

Clearly the attractiveness of the principle of legality and the courts’ increasing reliance on it are not unproblematic for the status of the PAJA, which is after all the legislation supposed to give effect to the rights in s 33. As Currie says, the ‘alternative administrative law’ presented by the principle of legality may tempt one to ‘cut out consideration of the troublesome PAJA altogether and restore legality (ie the common law) to a principal status’. Yet the development of the principle of legality and the possibility of its future expansion offer important lessons, too. They demonstrate the ultimate futility of trying to reduce the scope of the administrative justice rights, whether by means of a threshold concept such as ‘administrative action’ or in some other way, for in a constitutional democracy the ‘accountability vacuum’ will surely be filled in one way or another – and the courts will simply end up applying the same requirements under another banner.

In line with this, Breitenbach has observed that with the growth of the principle of legality, the practical significance of the distinction between administrative action and the exercise of other powers will in many cases be lessened. This, he suggests, is a welcome development, as it ‘accords with the move away from conceptualism, as well as with the fact that nowadays judicial review of administrative action forms part of an integrated system of controls of public power rooted in the Constitution’. Here he makes an important point. The principle of legality may be regarded as a significant instance of ‘anti-formalism’, for it suggests that in our transformed public law the pigeonholing of a legal problem is less important than the ability of the system as a whole to demand accountability and to exert control. The crucial thing, surely, is that there should be a response from the system, not that the response be located anywhere in particular.

(b) The development of a doctrine of deference

In recent years the South African courts have begun to work explicitly on a doctrine of deference in administrative law. This is a significant and encouraging development, in my

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218 Hoexter ‘Administrative Action’ (note 194 above) 321.
220 Ibid.
view, and a further indication of post-1994 anti-formalism.\textsuperscript{221}\ The reason lies in the close link between judicial formalism and judicial submission in the pre-democratic era. Before 1994 deference to the legislature and executive was practised as a matter of course, and often to extremes, but without being fully or openly acknowledged. It has been shown above that deference and parsimony found expression in the ‘code’ of appeal and review and similar distinctions, and in the stylised vocabulary of the classification of functions. Undue deference and formalism were thus thoroughly entwined.

Candour, the opposite of code, was called for. As Cockrell argued in 1993, one could not simply replace the deference of old with judicial activism; that would hardly be an adequate response to the challenges of constitutional democracy and transformation.\textsuperscript{222}\ There was thus an urgent need to articulate ‘rigorous and coherent principles to guide judicial intervention and non-intervention’\textsuperscript{223}\ in administrative law. Writing in 2000, I argued that this need had become acute and proposed in outline the sort of deference that was worth aspiring to.\textsuperscript{224}\ Perhaps the most important point was that deference should not be confused with submissiveness to the other branches of government or the abdication of judicial responsibility.\textsuperscript{225}\ I suggested, too, that a South African conception of deference could usefully be informed by a variable (as opposed to all-or-nothing) application of the grounds of review.\textsuperscript{226}\ This approach has received some support from the highest courts in a line of cases dealing with review for reasonableness and associated grounds. In these cases deference has been placed within the framework of the separation of powers, and the courts have made it clear that the concept has nothing to do with submissiveness or servility. Thus in \textit{Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd}, case arising out of the allocation of fishing quotas, Schutz JA emphasised that judicial deference ‘does not imply

\begin{flushleft}\textsuperscript{221}\ Cf J R de Ville ‘Deference as Respect and Deference as Sacrifice: A Reading of \textit{Bato Star Fishing v Minister of Environmental Affairs’} (2004) 20 SAJHR 577, who sees formalism even in the court’s contextual approach.  
\textsuperscript{222}\ Cockrell ‘Can You Paradigm?’ (note 141 above) 247. Interestingly, item iv of the Areas Requiring Further Consideration in the Breakwater Declaration refers to ‘the potential for abuse of mechanisms of administrative review, especially in order to block social reconstruction by a future government’.  
\textsuperscript{223}\ Cockrell ‘Can You Paradigm?’ (note 141 above) 247.  
\textsuperscript{225}\ Hoexter ‘Future of Judicial Review’ (note 73 above) 501-2. See also P Lenta ‘Judicial Deference and Rights’ 2006 TSAR 456 at 457.  
\textsuperscript{226}\ Hoexter ‘Future of Judicial Review’ (note 73 above) 502-4. As a matter of logic all the grounds of review apply to all administrative action, at least in the context of the PAJA – so that if an action qualifies as administrative, it will potentially be subject to every one of the grounds listed in s 6 of the Act. In practice, however, there is room for variation in the manner in which these grounds are applied and in the strictness with which they are enforced.
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judicial timidity or an unreadiness to perform the judicial function\textsuperscript{227} – an observation that was endorsed by O’Regan J when the matter went to the Constitutional Court in \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs}.\textsuperscript{228} Instead, Schutz JA saw deference as a matter of both constitutional and institutional competence: it expressed the allocation of administrative powers to the executive rather than the judiciary,\textsuperscript{229} and it was especially appropriate ‘where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency’.\textsuperscript{230} In the court’s view the decision-making before it fell into that category, more particularly since it entailed the exercise of a wide discretion to strike a balance between a large number of different and competing factors. In \textit{Logbro Properties (Pty) Ltd v Bedderson NO}, the very first South African case to engage officially with deference, the decision was also a complex one in which the administrator, a tender board, had to balance a number of public interests.\textsuperscript{231}

In \textit{Bato Star} O’Regan J elaborated on the nature of deference, emphasising that in treating administrative decisions with respect a court is not expressing servility but simply ‘recognising the proper role of the executive within the Constitution’.\textsuperscript{232} For this reason she preferred the term ‘respect’ to ‘deference’.\textsuperscript{233} Respect entails that

‘a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. . . . A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.’\textsuperscript{234}

\textsuperscript{227} \textit{Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd} 2003 (6) SA 407 (SCA) para 50.
\textsuperscript{228} Note 81 above, para 46.
\textsuperscript{229} \textit{Minister of Environmental Affairs v Phambili Fisheries} (note 227 above) para 50.
\textsuperscript{230} Ibid para 53.
\textsuperscript{231} Note 166 above, paras 20-1; and see Hoexter ‘Judicial Policy Revisited’ (note 44 above) 291 and 294.
\textsuperscript{232} \textit{Bato Star v Minister of Environmental Affairs} (note 81 above) para 48.
\textsuperscript{233} Ibid para 46, where she noted that ‘[t]he use of the word “deference” may give rise to misunderstanding as to the true function of a review Court’. O’Regan J then quoted from the judgment of Lord Hoffmann in \textit{R v British Broadcasting Corporation} [2003] 2 All ER 977 paras 75-6, where he rejected the ‘overtones of servility’ suggested by the term ‘deference’ and pointed out that ‘when a court decides that a decision is within the proper competence of the Legislature or Executive, it is not showing deference. It is deciding the law.’
\textsuperscript{234} \textit{Bato Star v Minister of Environmental Affairs} (note 81 above) para 48.
O’Regan J also made it clear that respect does not mean simply rubber-stamping an unreasonable decision in recognition of the complexity of the decision or the identity of the decision-maker.\(^{235}\) This is a point of some importance, as those who feel unease about the idea of deference often seem to have the false impression that it plays the role of an invader – something outside the arena of review, as it were, and capable of upsetting the normal processes of review.\(^{236}\) It should rather be seen as a legitimate and indeed necessary part of the process. Properly understood, it informs the process of review and is constitutive of it.

The *Bato Star* understanding of respect necessarily implies some variation in the way reasonableness is applied. The variability of reasonableness was recently underscored again by Chaskalson CJ when he described both reasonableness and fairness as ‘context-specific’.\(^{237}\) Furthermore, the factors listed in *Bato Star* for determining reasonableness\(^{238}\) give considerable scope for variation: each of the six factors mentioned seems capable of making a real difference to the court’s assessment of reasonableness in a particular case. In *Bato Star* itself the range of interests having to be balanced in the allocation of fishing quotas (or what the court in *Logbro* described as the complexity of the decision)\(^ {239}\) clearly played a significant role, as did the administrator’s expertise. The provision of compelling reasons for a decision (or, conversely, the disproportionately negative impact of a decision) could similarly tip the balance in another case. Thus the *Bato Star* factors are just as relevant to respect as they are to reasonableness itself.

The doctrine of respect set out in *Bato Star* has been relied on in several more recent cases. In *Associated Institutions Pension Fund v Van Zyl*, for instance, Brand JA found it appropriate to defer to the ‘training, skills, experience and intricacies involved in actuarial science’ in concluding that the respondents had failed to make out a case that the methodology was not one that an actuary could reasonably have adopted.\(^{240}\) In a more recent case Davis J felt assured that setting aside an ‘irrational, inexplicable and unreasonable’

\(^{235}\) Ibid, applied for instance in *Lazarides v Chairman of the Firearms Appeal Board* [2008] 2 All SA 81 (T) paras 48-50.


\(^{237}\) *New Clicks (CC)* (note 117 above) paras 108 and 145. The ‘sliding scale of reasonableness’ in judicial review in English law was recognised by Laws LJ in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 para 19.

\(^{238}\) The factors set out in *Bato Star v Minister of Environmental Affairs* (note 81 above) para 45 are the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.

\(^{239}\) *Logbro Properties v Bedderson* (note 166 above) para 21.

\(^{240}\) *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) para 39. See also *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 102 (in relation to diplomatic protection).
allocation of fishing rights did not breach the principle of separation of powers.\textsuperscript{241} When it came to the question of remedy, however, ‘prudence and the limits of institutional competence’ dictated that the court ‘should not assume the role of a fish allocator’.\textsuperscript{242}

Apart from judicial support such as this, there has also been considerable scholarly debate about the doctrine generally and how it should be developed in future.\textsuperscript{243} An explicit, conscious doctrine of deference or respect is thus becoming part of transformed South African administrative law.

4.6 CONCLUSION

In this chapter it has been argued that the transformation of South African administrative law demanded a movement away from formalistic and ‘coded’ judicial reasoning and towards a more substantive style of reasoning, in accordance with the substantive vision of the democratic Constitution. But formalism has also been shown to be part of South Africa’s legal heritage and a significant element in its legal culture generally. Given the subtle and insidious nature of a legal culture and the double-edged nature of formalistic reasoning, formalism is not something that can necessarily be eradicated easily or quickly from a legal system.

This chapter has shown that in administrative law, considerable progress has been made in some respects: the porous nature of the review/appeal dichotomy has been acknowledged, for instance, and the rigid classification of functions abandoned. Other significant steps taken away from formalism include the courts’ reliance on the constitutional principle of legality and their development of an explicit doctrine of deference. Nevertheless, the courts still rely on formalistic reasoning in certain areas, notably at the intersection of administrative law and contract. Furthermore, certain provisions of the PAJA seem actively to encourage conceptualism, a particular type of formalism.

\textsuperscript{241} Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management 2006 (2) SA 199 (C) at 210D.
\textsuperscript{242} Ibid at 211G-H. See also Ekurhuleni Metropolitan Municipality v Dada NO 2009 (4) SA 463 (SCA) paras 10-11.
\textsuperscript{243} The most important contributions to the debate include John M Evans ‘Deference with a Difference: Of Rights, Regulation and the Judicial Role in the Administrative State’ (2003) 120 SALJ 322; De Ville (note 66 above) 23ff; De Ville ‘Deference as Respect’ (note 221 above); Corder ‘Without Deference, With Respect’ (note 82 above); Davis ‘To Defend and When?’ (note 97 above); David J Mullan ‘Deference: Is it Useful Outside Canada?’ 2006 Acta Juridica 42; Corder ‘From Despair to Deference’ (note 82 above).